

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re NURTURE BABY FOOD LITIGATION

Master File No.: 1:21-cv-01217-MKV

This Document Relates To:

The Honorable Mary Kay Vyskocil

ALL ACTIONS

**W-R SLATE'S RESPONSE TO
STEWART MOVANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

The W-R Slate¹ respectfully submits this response to the Stewart Movants' Notice of Supplemental Authority, ECF 119, identifying the Plum Order.² The existence of a favorable decision denying a motion to dismiss in a similar case in California underscores the importance of this litigation. The Plum Order is a positive development for the baby food heavy metal litigation around the nation. The Plum Order also follows the general tendency of courts to deny motions to dismiss in consumer protection matters like this one. *See, e.g., Kacocha v. Nestle Purina Petcare Co.*, No. 15-cv-5489, 2016 WL 4367991, at *14 (S.D.N.Y. Aug. 11, 2016) ("To be sure, ample case law exists allowing § 349 claims over allegedly deceptively labeled consumer goods to progress beyond the motion-to-dismiss stage, largely based on the view that the question of what might deceive the reasonable consumer is a question of fact.") (collecting cases).

Nevertheless, given the immense amount of work to be done following a ruling on a motion to dismiss, a single out-of-district order is not dispositive with respect to this Court's selection of leadership in this case. Each of the candidate slates³ for the Nurture litigation are respected and experienced counsel, all of whom have experience in defeating motions to dismiss as in the Plum Order. However, most of the strategic decisions and actions will unfold after this Court's ruling on a motion to dismiss (assuming that this Court denies any such motion), especially given the complexity of this matter involving different defendants, different food representations, and multiple defense counsel.

¹ The Plaintiffs represented by the W-R Slate, and its counsel, are listed in their Motion (ECF 74), Response (ECF 102), and Reply (ECF 110).

² Order Granting in Part and Denying in Part Motion to Dismiss and/or Stay in *In Re Plum Baby Food Litig.*, No. 4:21-cv-00913-YGR (N.D. Cal. Jan. 12, 2022), ECF 125 (the "Plum Order").

³ *See* (1) the W-R Slate (ECF 74), (2) the Philippe Team (ECF 86), (3) the Stewart Movants (ECF 70), and (4) the Bloch/Zigler firms (No. 1:21-cv-08030-MKV, ECF 9).

The Court's appointment of experienced food law counsel with deep Second Circuit and New York federal court experience will best serve the interests of Plaintiffs and consumers and promote the efficient disposition of this litigation. The W-R Slate respectfully submits it is the candidate slate with the most experience in food law in this Circuit. The W-R Slate has achieved landmark results from the motion to dismiss phase⁴ through class certification⁵ and appeal.⁶

⁴ *Barton v. Pret-a-Manger (USA) Ltd.*, 535 F. Supp. 3d 225 (S.D.N.Y. 2021) (in food case litigated by W-R Slate members, denying motion to dismiss New York consumer protection claims brought for violation of GBL 349 and 350 for alleged misrepresentations); *Grossman, et al. v. Simply Nourish Pet Food Co., LLC*, 516 F. Supp. 3d 261 (E.D.N.Y. 2021) (denying motion to dismiss in case litigated by W-R Slate members); *Sharpe v. A&W Concentrate Co. et al.*, 481 F. Supp. 3d 94 (E.D.N.Y. Aug. 24, 2020) (denying motion to dismiss in food related consumer class action litigated by W-R Slate member); *Sitt v. Nature's Bounty, Inc.*, No. 15-cv-4199-MKB-MDG, 2016 WL 5372794, at *12 (E.D.N.Y. Sept. 26, 2016) (in case litigated by W-R Slate member, denying motion to dismiss on NY GBL claims and breach of warranty claims concerning presence of lead in dietary supplement and noting "a consumer could nevertheless reasonably conclude that Product does not contain lead, as the lead content – even if minimal – is not disclosed to consumers"); *Silva v. Smucker Nat. Foods, Inc.*, 14-cv-6154 (JG) (RML), 2015 WL 5360022 (E.D.N.Y. Sept. 14, 2015) (denying motion to dismiss in food related consumer class action litigated by members of the W-R Slate); *In re Frito-Lay N.A. Sales Practices and Mktg. Litig.*, No. 1:12-md-02413-RRM-RLM, 2013 WL 4647512 (E.D.N.Y. Aug. 29, 2013) (denying motion to dismiss regarding mislabeled food products in case litigated by W-R Slate member); *Ackerman v. the Coca-Cola Co.*, No. 09-cv-0395-JG, 2010 WL 2925955 (E.D.N.Y. July 21, 2010) (in case litigated by W-R Slate member, denying, in part, motion to dismiss in case involving allegations of harmful ingredient in popular line of beverages); *Jernow v. Wendy's Int'l, Inc.*, No. 07-cv-3971, 2007 WL 4116241 (S.D.N.Y. Nov. 15, 2007) (denying motion to dismiss in case involving a noxious ingredient contained in food products litigated by W-R Slate member).

⁵ See, e.g., *Sharpe v. A&W Concentrate Co.*, No. 19-cv-00768-BMC, 2021 WL 3721392, at *11 (E.D.N.Y. July 23, 2021) (granting motion for class certification in case involving allegedly mislabeled beverages and appointing W-R Slate member as co-lead counsel for the certified class); *Hasemann v. Gerber Products, Inc.*, 331 F.R.D. 239 (E.D.N.Y. 2019) (granting class certification in case alleging misbranding of infant formulas and appointing W-R Slate member as co-lead counsel of the certified classes).

⁶ *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018) (case litigated by W-R Slate member in which the Second Circuit set the favorable standard for consumers in food related consumer protection cases at the motion to dismiss phase).

The W-R Slate respectfully requests that the Court appoint it as Interim Class Counsel in this matter.

Dated: February 7, 2022

Respectfully submitted,

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